

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





76-1462

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NO. 76-1462

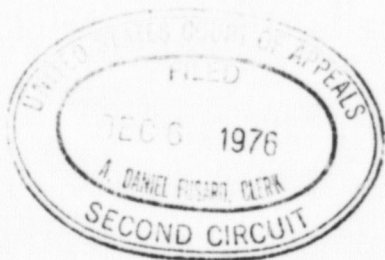
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UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee  
  
- against -  
  
LAMONT FLOYD and PETER OLIVO,  
  
Defendant-Appellants.

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APPELLANTS JOINT APPENDIX

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THOMAS J. O'BRIEN  
Attorney for Appellant Olivo  
Two Pennsylvania Plaza  
New York, New York

PAUL E. WARBURGH, JR.  
Attorney for Appellant Floyd  
324 Park Avenue  
Huntington, New York

PAGINATION AS IN ORIGINAL COPY

DEAL

207 1 0720

LAMONT FLOYD

76 CR 296

Case Filed  
Mo. Day

76 296

XXX

JUVENILE

3

U.S. MAG.  
CASE NO.

OFFENSES CHARGED  
18:2113(a) Bank Robbery  
18:2113(d) Bank Robbery and use of a dangerous weapon

ORIGINAL COUNTS

1

1

BEST COPY AVAILABLE

SUPERSEEDING  
COUNTS

ARREST

ARREST

ARREST

TRIAL

4/27/76

7/12/76

6/21/76

6/21/76

MAGISTRATE

INITIAL NO.

OUTCOME

SENTENCE

10/8/76

Disposition  
of Charges

Not Involved

Accepted

Dismissed

On Unlawful Motion

On Appeal

On Trial

On Motion

On Writ

On Unlawful Motion

ATTORNEYS

X

Paul Warburgh  
324 Park Avenue  
Huntington, N.Y. 11743  
(516) 271-3546

Jonathan Marks

OLIVO-2, KING-3

EXCLUDABLE OF A

4/27/76 Before BARTELS, J.- Indictment filed  
5/12/76 Petition for writ of habeas corpus ad prosequendum filed-issued  
5-13-76 Before PLATT, J - case called - deft arraigned and after  
being advised of his rights and on his own behalf enters a  
plea of not guilty - 10 days for all motions - deft in  
custody - adjd to May 28, 1976 for status report.  
5-14-76 Writ ret'd and filed - executed.  
5-21-76 Before PLATT, J - case called - bail set at \$50,000 surety  
bond - defts motion for private investigator ~~investigator~~  
investigator - motion granted, sum not to exceed \$300.  
Respectfully referred to to PRATT, J.  
5-21-76 ~~xxxx~~ Petition for Writ of Habeas Corpus Ad Testificandum  
filed - Writ Issued.  
5-26-76 Writ ret'd and filed - executed.  
5/28/76 Before PRATT, J.- Case called- defts not present-counsel present-  
case adjd to 6/21/76 for trial  
6/1/76 Financial affidavit filed  
6/1/76 By PLATT, J.- Order appointing counsel filed

A-1



REPORT OF THE COURT CLERK

DATE	V PROCEEDINGS CONTINUED	PAGE TWO	V EXCLUDABLE DELAY				Total Days (10)	A Ex cl ud a b l e
			Delay (10)	Excludable (10)	Code (10)	Days (10)		
6-11-76	Notice of Alibi filed.							
6-15-76	Petition for Writ of habeas corpus ad testificandum filed. Writ issued.							
6-16-76	Writ ret'd and filed - executed.							
6-21-76	Before PRATT, J - case called - deft & counsel present - trial ordered and begun - Jurors selected and sworn - Govt opens - deft opens - trial cont'd to June 22, 1976							
6-22-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Trial cont'd to June 23, 1976							
6-23-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Govt rests - defts motion for judgment of acquittal - motion argued and denied - Trial cont'd to 6-24-76							
6-24-76	Before PRATT, J. - Case called. Deft & counsel present. Trial resumed. Deft rests. Govt rests. Trial continued to 6-25-76 at 9 A.M.							
6-25-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Govt sums up - Deft sums up - trial cont'd to June 28, 1976							
6-28-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Jury returns with a verdict of guilty on counts 1 & 2 Jury discharged - trial concluded - bail cont'd - sentence adj'd without date.							
6-30-76	Voucher for expert services filed							
7-9-76	Stenographer's transcript dtd 6-25-76 filed.							
9-24-76	Before Pratt, J - case called - deft & counsel Paul Warburgh present - adj'd to Oct. 1, 1976 for sentencing.							
9/28/76	Voucher for compensation for expert services filed.							
9-28-76	Stenographers transcript filed dated 9-24-76							
10-1-76	Before PRATT, J - Case called- Deft. and counsel P.E. Warburgh present. Case adj'd to 10-8-76 at 11:30 A.M. for sentence.							
10/8/76	Before PRATT, J.- Case called. Deft & Counsel present. Deft sentenced on cts 1 and 2 to imprisonment for a total period of 15 years. Court orders that the clerk file a Notice of Appeal in forma pauperis.							
10/8/76	Judgment & Commitment filed. Certified copies to Marshals & Probation.							
10/13/76	Notice of Appeal filed.							
10/13/76	Docket entries and duplicate of notice of appeal mailed to the Court of Appeals.							
10/22/76	Order received from the Court of Appeals that the record on appeal be docketed on or before October 27, 1976.							
11-10-76	Voucher for compensation for expert services filed							

APPEAL

X76 CR 290

0720

PETER OLIVO

Case Filed  
Mo 4 Day 27  
No. of 3

76-1987  
76 296

18:2113  
18:2113(a)

Bank Robbery  
Bank Robbery and use of a  
dangerous weapon

ORIGINAL COUNTS  
1  
1

U.S. MAG  
CASE NO  
BAIL - RELEASE  
AMT  
Set  
\$ 50,000  
Date  
10% Dep  
Surety P  
Bail Not Made  
Status Changed  
(See Docket)  
3rd  
Pry Cust

KEY DATES & INTERVALS

ARREST

ARREST X

ARRAIGNMENT

TRIAL

SENTENCE

4/27/76

5/7/76

6/21/76

6/29/76

10/11

Disposition  
of Charges  
X Convicted  
Acquitted  
Dismissed  
On Government Motion

MAGISTRATE

INITIAL NO

OUTCOME

DISMISSED  
HELD FOR GJ OR OTHER PRO-  
CEEDING IN THIS DISTRICT  
HELD FOR GJ OR OTHER PRO-  
CEEDING IN DISTRICT BELOW

ATTORNEYS

Thoma O'Brien  
2 Penn Plaza, NYC.  
947-6147

Jonathan Marks

FLOYD-1, KING-3

- 4/27/76 Before BARTELS, J.- Indictment filed- bench warrant ordered
- 4/27/76 Bench warrant issued
- 5/7/76 Before PLATT, J.- Case called- deft arraigned and enters a plea of not guilty-bail set at \$50,000.00 surety bond
- 5-13-76 Bench Warrant retd and filed - deft arrested by FBI May 7, 1976
- 6-21-76 Before PRATT, J - case called - deft & counsel present - trial ordered and begun - Jurors selected and sworn - Govt opens - deft opens - trial contd to June 22, 1976
- 6-22-76 Before Pratt, J - case called - deft & counsel present - trial resumed - trial contd to June 23, 1976
- 6-23-76 Before PRATT, J - case called - deft & counsel present - trial resumed - Govt rests - defts motion for judgment of acquittal - motion argued and denied - trial contd to June 24, 1976
- 6-24-76 Before PRATT, J. - Case called. Deft & counsel present. Trial resumed. Deft rests. Govt rests. Trial continued to 6-25-76 at 9 A.M.

A-3

A



DATE	DESCRIPTION	PAGE TWO		V. EXCLUDABLE DELAY				Total Days (d)	A
		(a)	(b)	(c)	(d)	(e)	(f)		
6-25-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Govt sums up - deft sums up - trial contd to June 28, 1976								
6-29-76	By PRATT, J Order appointing counsel filed								
6-28-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Jury retires with a verdict of guilty on counts 1 and 2 - jury discharged - trial concluded - bail contd and sentence adjd without date.								
6-30-76	Voucher for expert services filed								
6-30-76	Stenographer's transcript dtd 6-25-76 filed.								
7-16-76	Voucher for Export or Other Services received & filed.								
9-24-76	Before Pratt, J - case called - deft & counsel present - adjd to Oct. 1, 1976 for sentence								
9-28-76	Stenographers transcript filed dated 9-24-76								
10/1/76	Before PRATT, J.- Case called. Deft & Counsel present. Deft sentenced on cts 1 & 2 under the Y.C.A. pursuant to T-18, U.S.C. Sect. 5010 (C) for treatment & supervision for a period of 10 years or until discharged.								
10/1/76	Judgment & Order of probation filed. Certified copies to Marshals & Probation.								
10/5/76	Notice of Appeal filed.								
10/5/76	Docket entries and duplicate of Notice of Appeal sent to the Court of Appeals.								
10/12/76	Draft of govts request to charge filed.								
10/12/76	Deft Floyd's request to charge (Exhibit B) filed.								
10/12/76	Court exhibits numbered 3 through 12 filed.								
10/12/76	Draft of Court exhibits filed.								
10/12/76	Form of verdict from jury after deliberation filed.								
10/12/76	Certified copies of Judgment & Commitment returned and filed. Deft delivered to MCC, NY.								
10/12/76	Record on appeal certified and mailed to the Court of Appeals.								
10-20 76	Acknowledgment receive from Court of Appeal for Record on Appeal								
10/22/76	Certified copy of Judgment & Commitment returned and filed. Deft delivered to FCI, Milan, Michigan.								
10/22/76	Order received from Court of Appeals that the record on appeal be filed on or before October 27, 1976.								

A-4

B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X  
UNITED STATES OF AMERICA

- against -

LAURENCE FLOYD,  
PETER OLIVO and  
XAVIER KING,

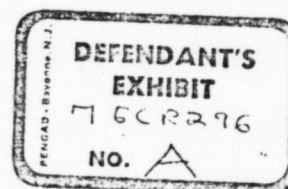
Defendants.

----- X  
THE GRAND JURY CHARGES:

*Math. J.*  
INDICEMENT

Cr. No. *76CR296*  
(Title 18, U.S.C., §§ 2113(a)  
and (4) and 22)

*4-27-76*



COUNT ONE

On or about the 31st day of October 1975, within the Eastern District of New York, the defendants LAURENCE FLOYD, PETER OLIVO and XAVIER KING knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 1104 Fulton Avenue, Brooklyn, New York, approximately eight thousand five hundred and ninety one dollars (\$8,591.00), in United States currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2).



CHARGE

On or about the 21st day of October, 1973, within the Eastern District of New York, the defendants, LAMONT FLOYD, PETER OLIVO and XAVIER KING knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 1104 Rutland Avenue, Brooklyn, New York, approximately Eight Thousand Five Hundred and Ninety One Dollars (\$8,591.00), in United States

currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, and in commission of this act and offense the defendants LAMONT FLOYD, PETER OLIVO and XAVIER KING did assault and place in jeopardy the life of the said bank employees as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Sections 2113(1) and 2).

A TRUE BILL

FORFEIT

DAVID G. TRACER  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK



ADDRESS REPLY TO  
UNITED STATES ATTORNEY  
AND REFER TO  
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK  
FEDERAL BUILDING  
BROOKLYN, N. Y. 11201

TRP:JMM:dms  
F. #761,531

June 1, 1976

Paul E. Warburgh, Jr., Esq.  
Kassner & Detsky P.C.  
122 East 42nd Street  
New York, NY 10017

Re: United States v. Lamont Floyd  
Docket No. 76 CR 296

Dear Mr. Warburgh:

Pursuant to F.R. Crim. P. 12.1(a), the Government hereby demands a written notice of your intention to offer a defense of alibi stating the specific place or places at which the defendant Lamont Floyd claims to have been at the time of the offense alleged in the indictment and the names and addresses of any and all witnesses upon whom the defense intends to rely to establish such alibi.

The bank robbery alleged in the indictment took place at the Chase Manhattan Bank, 1104 Rutland Road, Brooklyn, New York, on October 31, 1975, at approximately 10:15 A.M.

Very truly yours,

DAVID G. TRAGER  
United States Attorney

*Jonathan M. Marks*

By: JONATHAN M. MARKS  
Assistant U. S. Attorney

A-7

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA,

v.

LAMONT FLOYD,

Defendant.  
-----x

NOTICE OF ALIBI

CRIMINAL NO. 76 CR 296

PLEASE TAKE NOTICE, that the above named defendant intends to offer a defense at the trial of this action that at the time of the commission of the crime charged he was at some place other than the scene of the crime, to wit: 497 Myrtle Avenue, Brooklyn, New York.

PLEASE TAKE FURTHER NOTICE, that the defendant intends to call the following witnesses in support of such defense:

1. Sugulia Manning,  
C/O Kassner & Detsky, P.C.  
122 East 42nd Street  
New York, New York
2. Carla Dickerson,  
Address unknown
3. Anthony Prince,  
Address unknown
4. Louise Dickerson,  
497 Myrtle Avenue  
Brooklyn, New York

Dated: June 10, 1976

Yours etc.,

PAUL E. WARBURGH, JR.  
Attorney for Defendant  
Office & P.O. Address  
122 East 42nd Street  
New York, New York 10017  
Tel: 212-682-6600

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REQUEST NO. 1

ACCOMPLICE TESTIMONY

During this trial Xavier King testified against the defendant Paul. His testimony is inherently suspect for he may well have an important personal stake in the outcome of this trial. In so testifying he may believe that the acquittal of the defendants against whom he testified will destroy expected rewards that he may have been either explicitly or implicitly promised him in return for his testimony. United States v. Gonzalez, 488 F. 2d 833, 835-836 (CA2 1973); United States v. Padgent, 432 F 2d 701, 702 (CA2 1970). As a result, his testimony ought to be weighed by you with the very greatest care and caution and ought not to be passed upon by you under the same rules governing the other witnesses. United States v. Davis, 439 F. 2d 1105, 1106 (CA9 1971). See: United States v. Cataldo, 433 F. 2nd 38 41 (CA2 1970); United States v. Ploof, 464 F. 2nd 116, 119 (CA2 1972).

I further charge you as a matter of law that accomplices that are tankered with confessed criminality are often influenced in their testimony by a strong motive of hope of favor or of pardon, and, therefore, it is incumbent upon you to look carefully into the secret motive that might actuate bad minds to draw in and victimize the innocent. United States v. Murray, 445 F. 2d 1171, 1176 (CA3 1971).

REQUEST NO. 2

DEFENDANT'S TESTIMONY

The defendant objects to any instruction which specifically refers to a defendant's testimony. Courts have held that it is more preferable that the defendant's testimony not be singled out. See: United States v. Reid, 410 F. 2d 1223, 1227 (CA7 1969); Taylor v. United States, 390 F. 2d 278, 284-285 (CA8 1968).

However, the court overrules this objection, the defendant would ask that the following request be read to the jury.

In a criminal case, a defendant cannot be compelled to take the stand and testify. Whether he testified or does not testify is a matter of his own choosing. A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness. Johnson v. United States, 318 U.S. 189, 195-196; Devitt and Blackmar, Federal Jury Practice and Instructions, Section 12.11.



REQUEST NO. 3

ALIBI

Evidence has been introduced tending to establish an alibi, which amounts to a contention that the defendant was not present at the time when or at the place where he is alleged to have committed the offense charged in the indictment.

If after consideration of all the evidence in the case, you have a reasonable doubt as to whether the defendant was present at the time and place the alleged offense was committed, you must acquit him.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

1 THE COURT. Members of the jury:

2 jb/ss

3 Sam2

4 We are now at the stage of trial where you are  
5 about to undertake your final function as jurors.  
6 Your duty is a serious and important one. In  
7 performing it you actively share with me the  
8 responsibility of administering justice according to  
9 law and the evidence in this case. Your oath as jurors  
10 obliges you to discharge this final task in an  
11 attitude of complete fairness and impartiality -- and  
12 as was emphasized by me when you were selected as  
13 jurors -- without bias or prejudice, for or against the  
14 Government or the defendants as parties to this  
15 controversy. You must not permit yourselves to be  
16 governed by sympathy or any other consideration which  
17 is not founded in the evidence and in these  
18 instructions on the law.

19 The case is important to the Government, since  
20 the enforcement of the criminal laws is of prime  
21 importance to the welfare of the community.

22 Obviously, it is equally important to the  
23 defendants, who are charged with serious crimes and  
24 have the right to receive a fundamentally fair trial --  
25 the community has an interest in that too.

Let me add: The fact that the Government is a  
party entitles it to no greater consideration than that

21  
2 accorded to any other party to a litigation.

3 by the same token, it is entitled to no less  
4 consideration.

5 All parties, the Government and individuals  
6 alike, stand as equals before the bar of justice.

7 In this charge I shall describe for you first  
8 the general principles applicable to all criminal trials,  
9 then the nature of the charges in this case, and then  
10 the specific rules of law which are applicable to those  
11 charges and something about the evidence which you have  
12 heard, and finally something about how you should reach  
13 a verdict.

14 Your final role is to decide and pass upon the  
15 fact issues in the case.

16 You are the sole and exclusive judges of the  
17 facts.

18 You determine the weight of the evidence; you  
19 appraise the credibility of the witnesses; you draw  
20 the reasonable inferences from the evidence.

21 My function now is to instruct you as to the  
22 law, and it is your duty to accept these instructions  
23 as to the law and to apply them to the facts as you  
24 may find them.

25 With respect to any fact matter, it is your



recollection, and yours alone that governs.

Anything that counsel, either for the Government or the defense, may have said with respect to matters in evidence -- whether during the trial, in a question, in argument, or in summation -- is not to be substituted for your own recollection of the evidence.

So, too, as to any matter in evidence, anything that I may have said during the trial, or may refer to during the course of these instructions, is not to be taken in place of your own recollection. I have no view of the guilt or innocence of these defendants.

The indictment is merely an accusation -- a charge. It is not evidence of the defendants' guilt.

Since each defendant has pleaded not guilty, the Government has the burden of proving the charges against each defendant beyond a reasonable doubt.

A defendant does not have to prove his innocence.

On the contrary, each defendant is presumed to be innocent of the accusations contained in the indictment.

As to each defendant this presumption of innocence was in his favor at the start of the trial; it continued in his favor throughout the entire trial; it is in his favor even as I instruct you now, and it



## Charge

remains in his favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied that the Government has sustained its burden of proving his guilt beyond a reasonable doubt. If the Government has failed to sustain its burden, then the presumption of innocence alone is sufficient to acquit him.

The fact that the defendants have been tried together in one trial is a legal decision made by the Court and is a fact beyond the control of the defendants.

You are to draw no unfavorable inference against the defendants or any of them because of the fact that they were tried together in this trial.

Now, I have used the term reasonable doubt. What is a reasonable doubt?

The words almost define themselves -- that there is a doubt founded in reason and arising out of the evidence in the case, or the lack of evidence.

It is a doubt which a reasonable person has after carefully weighing all of the evidence.

Reasonable doubt is a doubt which appeals to your reason; to your judgment; to your common sense and your experience.

2           It is not caprice, whim, speculation,  
3 conjecture or suspicion; it is not an excuse to avoid  
4 the performance of an unpleasant duty; it is not  
5 sympathy for a defendant.

6           If, after a fair and impartial consideration of  
7 all the evidence, you can, candidly and honestly, say  
8 you are not satisfied of the guilt of a defendant --  
9 that you do not have an abiding conviction of his guilt  
10 -- in sum, if you have such a doubt as would cause you,  
11 as prudent persons, to hesitate before acting in  
12 matters of importance to yourselves, then you have a  
13 reasonable doubt, and in that circumstance it is your  
14 duty to acquit.

15           On the other hand, if after such an impartial  
16 and fair consideration of all the evidence, you can,  
17 candidly and honestly, say you do have an abiding  
18 conviction of a defendant's guilt, such a conviction  
19 as you would be willing to act upon, in important and  
20 weighty matters in the personal affairs of your own  
21 life, then you have no reasonable doubt, and under  
22 such circumstances, it is your duty to convict.

23           One final word on this subject. Reasonable  
24 doubt does not mean a positive certainty, or beyond all  
25 possible doubt. If that were the rule, few persons,



1 however guilty they might be, would be convicted.

2  
3 Since it is practically impossible for a person  
4 to be absolutely and completely convinced of any  
5 contraverted fact, the law in a criminal case is that  
6 it is sufficient if the guilt of a defendant is  
7 established beyond a reasonable doubt -- not beyond all  
8 possible doubt.

9 Nor is it the Government's burden to prove each  
10 and every bit of evidence to be true beyond a reasonable  
11 doubt. Its burden is to prove beyond a reasonable  
12 doubt each and every essential element of the crime  
13 charged.

14 Reasonable doubt may arise from the failure of  
15 the Government to produce evidence.

16 A defendant is not obligated to present  
17 evidence in his favor. He had the right to rely on the  
18 failure by the Government to prove its case. He may  
19 also rely on evidence brought out on cross-examination  
20 of witnesses called by the Government. On the other  
21 hand, a defendant has the power to subpoena anyone in  
22 support of his position if he so chooses, and he may  
23 exercise that power, if he chooses.

24 I have used the terms "inference" and  
25 "presumption."

2 An inference is a conclusion which reason and  
3 common sense lead you to draw from the facts which  
4 have been established by the evidence in the case and  
5 it is the jury which may draw the inference.

6 A presumption is a conclusion which the law  
7 requires the jury to make and continues only so long  
8 as it is not overcome or outweighed by evidence in the  
9 case to the contrary. But, unless and until the  
10 presumption is outweighed by evidence, the jury is  
11 bound to find in accordance with the presumption, for  
12 example, the presumption of innocence to which I have  
13 already referred.

14 Evidence is the method by which a disputed  
15 fact is proved or disproved. Evidence is generally  
16 classified as direct or circumstantial or indirect.

17 Direct evidence is the testimony of a witness  
18 as to what that witness saw or heard, that is, what he  
19 knows of his own knowledge.

20 Circumstantial or indirect evidence, however,  
21 is where facts are established from which, in terms of  
22 common experience, one may logically infer other  
23 facts that are sought to be established.

24 For example, if you were to go outside after we  
25 finish the trial this afternoon, or tomorrow or



2 whenever it may be, and you see rain falling and you go  
3 out and you feel it. That is direct evidence to you.  
4 And if you were to testify, your testimony of it would  
5 be direct evidence that it was raining.

6 If you were to stand downstairs in the hall  
7 without looking outside closely enough to observe  
8 whether raindrops were falling, and you would see cars  
9 passing by with their windshield wipers going, that  
10 would be a circumstance from which you could reasonably  
11 infer that it was raining outside. If people come into  
12 the Courthouse and there is water dripping off them,  
13 they are shaking umbrellas or coming in with umbrellas  
14 to the entrance of the door and closing them, those  
15 are additional circumstances that you might reasonably  
16 infer without ever looking outside that at that moment  
17 it was raining outside. That is circumstantial  
18 evidence.

19 What is the evidence in this case which you may  
20 consider? It consists of:

21 Sworn testimony of witnesses regardless of who  
22 may have called them;

23 Exhibits received in evidence regardless of who  
24 may have produced them;

25 Facts which may have been admitted or stipulated

9 1

Charge

881

2

What is not evidence?

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The statements or arguments of counsel in opening, summation, or made during the trial are not evidence. Any statements I may have made are not evidence. Any evidence which I have directed be stricken from the record is not evidence. Any questions to which an objection has been sustained is not evidence. And you are not to speculate on what the answers might have been had I permitted the answer.

Now I come to the nature of the charge.

The indictment in this case charges in Count 1 that the defendants Lamont Floyd and Peter Olivo on October 31, 1975, together with Xavier King, knowingly and willfully, by force, violence and intimidation, took approximately \$3,591 in currency from Chase Manhattan Bank in Brooklyn, which was in the custody and possession of said bank, and that its deposits were insured by the Federal Deposit Insurance Corporation.

Count 2 of the indictment charges the same robbery with the additional factor that the defendants assaulted employees of the bank and other persons present and placed their lives in jeopardy by use of a dangerous weapon.

A-20



2 As I said earlier, this indictment states the  
3 charges against the defendants. It is not evidence  
4 which you may consider as supporting their guilt.

5 The two counts of the indictment are based  
6 Sections 2113(a) and (d) and Section 2 of Title 18 of  
7 the United States Code. These sections state in part:

8 Subsection (a) states:

9 "Whoever, by force and violence, or by  
10 intimidation, takes, or attempts to take, from the  
11 person or presence of another any property or money or  
12 any other thing of value belonging to, or in the care,  
13 custody, control, management or possession of any bank  
14 is guilty of a crime."

15 Subsection(d) states:

16 "Whoever, in committing, or in attempting to  
17 commit, any offense defined in Subsection (a) of this  
18 section, assaults any person, or puts in jeopardy the  
19 life of any person by the use of a dangerous weapon or  
20 device, is guilty of a crime."

21 The indictment also refers to Section 2 of  
22 Title 18 of the United States Code, which states in  
23 Subsection (a):

24 "Whoever commits an offense against the United  
25 States or aids, abets, counsels, commands, induces or

procures its commission is punishable as a principal.

That means that a person who aids in committing a crime is just as guilty as the one who actually commits it.

However, mere knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting.

In order to aid and abet another to commit a crime, it is necessary that the defendant in some way associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.

The elements of the crime which must be established before you can find either defendant guilty on Count 1 are:

First: The act or acts of taking from the person or presence of another, money belonging to or in the care, custody, control, management, or possession of a bank;

Second: The act or acts of taking such money by force or violence, or by means of intimidation;

Third: Doing such act or acts willfully, and

Fourth: That the bank was insured by the



2

Federal Deposit Insurance Corporation.

3

Count 2 requires proof of all these four elements plus a fifth:

4

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The act or acts of assaulting any person while stealing that money, or putting the life of any person in jeopardy by the use of a dangerous weapon while stealing such money.

9

10

Each of the elements must be established beyond a reasonable doubt.

11

12

Now, I will apply these elements briefly to the evidence which has been presented to you.

13

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19

In this case it is not contested that there was a bank robbery -- that on October 31, 1976 three men in masks entered the Chase Manhattan Bank carrying guns, took approximately \$8,000 from the tellers, and fled. The issue for you to determine is whether the defendants or either of them was involved in the robbery.

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The first element required for proof under Count 1 is the taking of money in the care of a bank. If you find that the robbery occurred and that either of these defendants participated in the robbery, then this element is satisfied as to him.

(Continued next page.)

A-23

2 element is that of either assaulting any person or  
3 putting the life of any person in jeopardy by the use  
4 of a dangerous weapon while engaged in stealing money  
5 from the bank. If you believe that any of the men who  
6 took part in the robbery threatened the guard or other  
7 people in the bank, or used a gun in the course of the  
8 robbery, if you find that to be so beyond a reasonable  
9 doubt, you may find that this element has been proved.

10 As I said before, you must also find whether  
11 either or both of the defendants were among the persons  
12 who did the acts involved. You must decide on all the  
13 evidence whether the defendant Floyl or whether the  
14 defendant Olive, or both of them, took part in the  
15 robbery.

16 Evidence has been introduced by each defendant  
17 tending to establish that he was not present at the  
18 time when or the place where he is alleged to have  
19 committed the crimes charged in the indictment. If  
20 after consideration of all the evidence in the case  
21 you have a reasonable doubt as to whether a defendant  
22 was present at the time and place the alleged offense  
23 was committed, you must acquit him.

24 The Government must prove every element of the  
25 crime charged beyond a reasonable doubt. If the



Government fails as to any element, you must acquit.

The fact that one element of the crime may or may not exist has no bearing upon any other element of the crime charged.

You may not infer solely from the existence of one element of the crime, if you conclude that the element has been established, the existence of any other element of the crime.

If any element of the crime has not been established beyond a reasonable doubt, your verdict must be not guilty. On the other hand, you must convict a defendant if each of the elements of any crime has been proved as to him beyond a reasonable doubt.

A difficult aspect of any jury's duty is to determine the credibility of the witnesses and to weigh their testimony. In this case the problem of credibility is one of the most critical problems.

The Government through its witnesses and other evidence asserts that the defendants were two of the bank robbers. Both defendants took the witness stand and denied their participation; each of them stating they were elsewhere at the time, and each of them presenting evidence in support of his claim.

2           You, the jurors, are the sole judges of the  
3           credibility of the witnesses. Credibility refers to the  
4           believability of their testimony and the weight their  
5           testimony deserves.

6           Your determination of the issue of credibility  
7           very largely must depend upon the impression that a  
8           witness made upon you as to whether or not he was  
9           telling the truth or giving you an accurate version  
10          of what occurred.

11          When you walk in the door of that Courtroom and  
12          sit in the jury box, while the trial is going on, when  
13          you are deliberating in the jury room, you have your  
14          common sense, your good judgment and your experience  
15          with you. You decide whether or not a witness was  
16          straightforward and truthful; whether he attempted to  
17          conceal anything; whether he has a motive to testify  
18          falsely; whether there is any reason why he might  
19          color his testimony.

20          In other words, what you try to do, to use the  
21          vernacular, is to size a person up just as you would  
22          do in any important matter where you were undertaking  
23          to determine whether or not a person is truthful,  
24          candid and straightforward.

25          Scrutinize the testimony given, and the



2 circumstances under which each witness testified, and  
3 every matter in evidence which tends to show whether a  
4 witness is worthy of belief.

5 Consider each witness' intelligence, motive and  
6 state of mind, demeanor and manner while on the  
7 witness stand. Consider his own ability to observe  
8 the matters as to which he has testified, whether he  
9 shall have impressed you as having an accurate  
10 recollection of those matters.

11 Consider the relation which each witness may  
12 bear to either side of the case, the manner in which  
13 each witness might be affected by the verdict; the  
14 extent to which, if at all, each witness is either  
15 supported or contradicted by other evidence.

16 (Continued next page.)

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2 1  
2 consideration the nature of the examination here, and  
3 the purpose of the statement on the prior occasion.  
4 You may take into consideration normal variations in  
5 retelling an event to determine whether the statements  
6 are truly inconsistent or merely a difference in  
7 describing an occurrence.

8 It is for you and you alone to determine whether  
9 an inconsistency is to a material or immaterial fact,  
10 and what effect the inconsistency has on the witness'  
11 credibility.

12 A witness, however, may be inaccurate,  
13 contradictory, or even untruthful in some respects,  
14 and yet be entirely credible in the essentials of his  
15 testimony.

16 The ultimate question for you to decide in  
17 passing upon credibility is:

18 Did the witness tell the truth here before you  
19 as to essential matters in his testimony?

20 If you find that any witness -- and this applies  
21 alike to Government and Defense -- willfully testified  
22 falsely as to any material fact, you have a right to  
23 reject the testimony of that witness in its entirety,  
24 or you may accept that part or portion which you  
25 believe to be credible.



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2 THE COURT: (Continuing.) Evidence that at  
3 some other time a witness has said or done something  
4 which is inconsistent with the witness' testimony at  
5 the trial may be considered by you for the purpose of  
6 judging the credibility of the witness. If adopted  
7 by the witness, that is, if the witness has admitted  
8 before you that he made the prior statement, it may  
9 also be used as negative evidence in the case.  
10 You may also consider the failure of the witness to  
11 disclose information on prior occasions, when the  
12 opportunity to do so presented itself, as inconsistent  
13 with that witness' testimony here at the trial.

14 Whether a prior statement is inconsistent is  
15 a fact question solely for your determination. You  
16 also determine whether the failure of a witness to  
17 reveal information prior to his testimony in Court  
18 before you, for example, in reports or in statements  
19 he may have made, you consider whether that is  
20 inconsistent with his present testimony. In making  
21 that determination you should consider all the facts  
22 and circumstances attendant at the time of making the  
23 prior statement or the omission of information. In  
24 determining whether the prior statement is inconsistent  
with the testimony given before you, you may take into

1  
2 The fact that some Government witnesses were  
3 Government employees or police officers does not  
4 entitle their testimony to any greater weight or  
5 consideration than that afforded to any other witness  
6 in the case.

7 You will evaluate their credibility the same way  
8 you do that of any other witness.

9 The law never imposes upon a defendant in a  
10 criminal case the burden or duty of producing any  
11 evidence.

12 A defendant cannot be compelled to take the stand  
13 and testify. Whether or not he testifies is a matter  
14 of his own choosing. If he does choose to testify, and  
15 the defendant: Floyd and the defendant Olive each did  
16 in this case, he is a competent witness. In that event  
17 he is subject to cross-examination, as you have  
18 observed, and his credibility is for you, as the jury,  
19 to determine, in the same manner as other witnesses.

20 You may consider that a defendant has a strong  
21 motive to lie to protect himself, but you may also  
22 consider that he takes a real risk in subjecting  
23 himself to cross-examination and you must decide whether  
24 to believe him or how much to believe.

25 Xavier King testified that he participated in

A-31



the crime charged. You have the right to suspect the testimony of a participant in the crime charged if you find that he has a personal stake in the outcome of the trial, or if you find that he believes that the rewards promised depend on the outcome of the trial. Mr. King is not incompetent to testify because of his participation in the crime charged. On the contrary, the testimony of a participant alone, if believed by you to be true beyond a reasonable doubt, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by any other evidence in the case.

You should keep in mind that the testimony of a participant is always to be received with caution and weighed with great care, and you should never convict a defendant upon the unsupported testimony of a participant unless you believe such unsupported testimony to be true beyond a reasonable doubt.

Mr. King testified that four men were involved in the bank robbery, himself, the defendant Floyd and Olivo, and Edward Almestica. Mr. Almestica is not available to testify in this case. You must disregard his absence. And from it you may not draw any inference whatsoever.

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2 you should find a verdict of guilty.

3 At certain times in the trial the attorneys  
4 mention "3500 material." That term refers to copies  
5 of prior statements of its witnesses which the  
6 Government, as required by law, had supplied to the  
7 defendants' attorneys to use if they wished in  
8 cross-examining those witnesses.

9 I have sought not to comment on the evidence in  
10 any detail or to give any impression as to my own  
11 view, if I have one, of the relative weight of the  
12 evidence. If I have done so, however, I ask you to  
13 disregard it entirely, because you are the sole judges  
14 of the facts.

15 From time to time in the course of the trial  
16 objections have been made and rulings on evidence  
17 given. Draw no inferences from the comparative  
18 frequency of objections of one or the other side or  
19 from the comparative record in having objections  
20 sustained. Where an objection to a question has been  
21 sustained, disregard the question and draw no  
22 inferences from its wording about the answer that might  
23 have been given. Where an objection is overruled,  
24 evidence then received has no special weight just  
25 because it was unsuccessfully objected to.

A-34



Under your oath as jurors, you cannot allow a consideration of the sentence which may be imposed upon a defendant, if he is convicted, to enter into your deliberations, or to influence your verdict in any way. In the event of a conviction, the duty of imposing sentence rests solely with the Court.

Your duty is to decide the case solely upon the evidence, to weigh the evidence in the case, and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and these instructions.

The verdict in each instance must be unanimous.

Each of you, as jurors, is entitled to your own opinion, but each of you should exchange views with your fellow jurors.

That is the very purpose of jury deliberation--to discuss and to consider the evidence; to listen to the arguments of fellow jurors; to present your individual views, to consult with one another; and to reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself

A-35

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after consideration with your fellow jurors. But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears to you to be erroneous.

However, if after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from others, you are not to yield your judgment simply because you are outnumbered.

Your final vote must reflect your conscientious view as to how the issues should be decided.

The charge here is most serious.

The just determination of this case is important to the public; it is equally important to these defendants.

Under your oath as jurors, you must decide this case without fear or favor and solely in accordance with the evidence and the law.

If the Government has failed to carry its burden as to a defendant, your sworn duty is to acquit.

If it has carried its burden as to a defendant you must not flinch from your sworn duty -- you must convict.

A-36



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If you wish to look at any of the exhibits, you may ask for them.

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If you wish to have some of the testimony repeated, you may make the request and I will call you into court and we will have read to you those portions of the testimony which you desire to hear.

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When you retire to the jury room, Kalish, Juror No. 1, will act as your forelady and preside over your deliberations. During your deliberations, you should assume the attitude of judges of the facts rather than partisans or advocates. In that way, you will be making a high contribution to the administration of justice.

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You must report a verdict on both counts. You may find either defendant guilty or not guilty on either or both of the counts, and the verdict in each case must be unanimous.

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The marshal will be available outside the jury room to report when you have reached a verdict or to let the Court know if there are any questions which you wish to have answered.

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I have prepared a form of verdict on which your forelady may record your findings.

25

When you have reached a verdict and are ready to



2 report, simply advise the marshal; but do not dis-  
3 close to him what your verdict is. I will have your  
4 forelady announce it orally back here in the Courtroom.

5 There will now be a short recess during which  
6 counsel will review the charge with me to make certain  
7 that nothing has been omitted or misspoken.

8 You may now retire to the jury room, but do  
9 not discuss the case until I have brought you back  
10 once more.

11 (The jury thereupon retired from the Courtroom  
12 at 12:40 o'clock p.m.)

13 (The following occurred in the absence of the  
14 jury.)

15 THE COURT: Any exceptions?

16 MR. O'BRIEN: The door is still open, your  
17 Honor.

18 MR. WARBURG: Your Honor, for the record, and  
19 to preserve my rights on appeal, I would except to  
20 the failure to charge my Request No. 1 in the language  
21 which I indicated.

22 That is as to my requests for instructions.

23 As to the charge, in addition to my Request  
24 No. 1, I object to your Honor mentioning to the jury  
25 anything about the defendant's testimony and singling

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it out.

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I except to the fact that you did not charge the language that I suggested if you so chose to single out defendant's testimony.

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THE COURT: The language was in your Request No. 2?

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MR. WARBURGH: I think it was two.

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THE COURT: Yes, it is No. 2.

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MR. WARBURGH: I specifically except to your Honor charging what is set out on Page 37 concerning Mr. Almestica and the fact that they are not to draw any inference from his absence here. That is it.

13

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MR. O'BRIEN: I join in those exceptions, your Honor.

15

THE COURT: Do you have any additional?

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MR. O'BRIEN: No, I do not, your Honor.

17

THE COURT: Are there any --

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MR. WARBURGH: O', just one. I would ask your Honor to instruct the jury that the defendants did not have a burden of producing any evidence whatsoever.

21

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THE COURT: I believe I did say that. I do not think I want to elaborate on it any further.

23

Mr. Warburgh, you will be leaving?

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MR. WARBURGH: Very shortly.

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THE COURT: As soon as the jury retires. Well,

A-39



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(The jury thereupon returned to the Courtroom

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at 12:45 o'clock p.m.)

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THE COURT: Miss Kalish, the clerk will hand

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you the form of verdict to help you record the

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conclusions which the jury will finally arrive at.

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After you have reached your verdict, as I instructed

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you before, you will come back into the Courtroom and

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the clerk will inquire of you, Miss Kalish, as to what

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your verdict is. In each instance you will simply

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record orally as to each count and each defendant.

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I understand that you already placed your orders

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for lunch. I believe that will be brought to you in

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the jury room. I leave it to your own good judgment,

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appetites, and inclinations as to your mixture of

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deliberations and lunch.

16

Ladies and gentlemen, your oaths sum up your

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duty -- and that is, without fear or favor to any man,

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you will well and truly try the issues between these

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parties according to the evidence given to you in Court

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and the laws of the United States.

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We have fortunately reached the stage of the

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trial with our original twelve jurors intact. I

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therefore at this time excuse the two alternate jurors.

24

I thank you very much for your patience and attention

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given to the case. You may not participate in the

A-40



16 1 deliberations with your twelve fellow jurors. You may,  
2 if you wish, of course, remain and find out what the  
3 outcome is. You are not obligated to do so. You are  
4 free to go.

5 The Court informs you that you must first,  
6 however, report downstairs to the central jury room  
7 and they will give you further instructions.

8 I believe we have two marshals to be sworn.

9 (Marshals sworn by the Clerk of the Court.)

10 THE COURT: You may now retire to the jury  
11 room.

12 (Thereupon, at 12:55 o'clock p.m. the jury  
13 retired to the jury room.)

14 MR. O'BRIEN: Your Honor, off the record, do  
15 we have the distinction of having tried the first  
16 criminal case before you?

17 THE COURT: Number 2.

18 MR. O'BRIEN: Your Honor, I would like to say  
19 that it has been a pleasure. I think my defendant  
20 has gotten a very fair trial and I hope to work before  
21 you again.

22 THE COURT: I would like to comment that all  
23 three of you have done an excellent job. I understand  
24 that both defense counsel were formerly U.S. Attorneys.

25 MR. O'BRIEN: That is correct.

A-41

17 1 MR. WARBURGH: That is correct.

2 THE COURT: I am impressed by the ability of  
3 all U.S. Attorneys that I have seen so far, and former  
4 U.S. Attorneys.

5 MR. O'BRIEN: Thank you very much.

6 MR. WARBURGH: Thank you.

7 MR. MARKS: Thank you, your Honor.

8 THE COURT: I wish the defendants in this case  
9 were present now. I think they have most ably been  
10 represented.

11 MR. O'BRIEN: Thank you very much.

12 MR. WARBURGH: Thank you.

13 THE CLERK: Your Honor, when counsel gives me  
14 the exhibits I will put them in the closet, lock them  
15 in the closet. And just for your knowledge, when I  
16 need them I will take them out.

17 MR. MARKS: And if you have any questions --

18 THE COURT: I will call you.

19 (A recess was thereupon taken from 1:00 p.m. to  
20 2:00 o'clock p.m.)

21 (Continued next page.)  
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A-42



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1 MR. MARKS: I want to find out what was done in  
2 response to the note.

3 THE COURT: All the exhibits have been given to  
4 the jury.

5 MR. MARKS: They asked for three maps of Brook-  
6 lyn and addresses of the defendants with respect to  
7 street maps of Brooklyn. There is only one street map  
8 of Brooklyn in evidence, that booklet and also the  
9 charts.

10 THE COURT: Both of those have been given.

11 MR. MARKS: Anything given in response to the  
12 addresses of the defendant?

13 THE COURT: They were given no information,  
14 only exhibits.

15 MR. MARKS: I understand.

16 THE COURT: Mr. O'Brien, did you see the first  
17 note from the jury?

18 MR. O'BRIEN: I understand it was the map, your  
19 Honor.

20 THE COURT: There have been two notes.

21 MR. O'BRIEN: I'm sorry.

22 THE COURT: Mr. Marks, in your absence just a  
23 moment ago, inquired as to what had been done. I  
24 informed him all exhibits have been given to the jury.

25 MR. O'BRIEN: Fine, your Honor.

A-43

1 THE COURT: Mr. Marks asked what about the  
2 request to the defendants' addresses and I informed him  
3 that no information had been given to them other than  
4 the exhibits. I waited until you gentlemen returned to  
5 determine how we would answer that particular request.

6 MR. O'BRIEN: My suggestion would be in accord-  
7 ance with the defendant's testimony.

8 THE COURT: The only testimony we have.

9 MR. O'BRIEN: Right.

10 MR. MARKS: We have some other evidence, evidence  
11 of Xavier King. And the evidence of the Agent that he  
12 lived at 343 Saratoga --

13 MR. O'BRIEN: I never heard that.

14 MR. MARKS: I will have to get my copy of the  
15 transcript.

16 THE COURT: Can I suggest we bring them back and  
17 read the jury whatever evidence there is pertaining to  
18 the addresses of the defendants?

19 Jonathan, I will make one suggestion. We write  
20 the jury a note and ask them if they want testimony of  
21 the addresses of the defendants. If they say yes, Mr.  
22 O'Brien and I will go through the testimony and find  
23 all the relevant portions.

24 MR. O'BRIEN: No, I like to know what they mean.  
25 They asked for the map, what they may be trying to do

A-44



1 is see where the defendants live in relation to 643  
2 Saratoga.

3 THE COURT: We don't know.

4 MR. O'BRIEN: Possibly your Honor can call the  
5 jury in and ask them what they are looking for.

6 THE COURT: All right.

7 MR. O'BRIEN: You can tell the jury the defend-  
8 ants have testified and this is what their addresses  
9 were. If that is what they are looking for, we will  
10 give them that. If they have any questions about that,  
11 whatever they want.

12 MR. MARKS: We can't give them the addresses of  
13 the defendants. All we can do is give the testimony  
14 on that issue.

15 THE COURT: Before we call them back, let's  
16 prepare for it.

17 MR. MARKS: It will take me ten minutes.

18 THE COURT: Let me know when you are ready.

19 (recess taken at this time.)

20 MR. O'BRIEN: Your Honor, we have agreed upon  
21 the pages. It's page 490 and 555 of the transcript.

22 What we have not agreed upon is the method that  
23 we should give it to the jury. It would seem to me we  
24 should give them the address, that is the only testimony  
25 regarding the address -- and I believe Mr. Marks would

A-45

1 agree to have the testimony read --

2 MR. MARKS: Maybe I can talk for myself.

3 With respect to page 490, does your Honor have  
4 that?

5 THE COURT: "Where were you? I was in a house  
6 on 497 Myrtle Avenue."

7 MR. MARKS: Yes, and then following that. I  
8 would ask that your Honor have read to the jury with  
9 respect to questions concerning the defendant Floyd's  
10 address lines 13 through 20 on page 490.

11 THE COURT: Any objection to that?

12 MR. O'BRIEN: Actually there is -- they ask for  
13 the addresses of the defendants. If we wrote it on a  
14 piece of paper --

15 THE COURT: Was there any other address?

16 MR. MARKS: Two addresses given, 49 and 497  
17 Myrtle Avenue. That is the way I remember it. 497 was  
18 a leading question by Mr. Warburgh --

19 THE COURT: Do you know anything about 49?

20 MR. MARKS: I don't know anything about 497.

21 MR. O'BRIEN: It seems clear what the jury is  
22 looking for is a relationship between Saratoga and  
23 Myrtle Avenues.

24 THE COURT: Right.

25 MR. MARKS: All the jury is entitled to is the

A-46



1 evidence. They are entitled to all the testimony on  
2 this point.

3 THE COURT: First we will find out what they  
4 want to know.

5 MR. MARKS: They are not entitled to summaries  
6 Or --

7 THE COURT: All they want to know is what the  
8 addresses are. I am not sure what I will do.

9 What is the other one?

10 MR. MARKS: 655 lines 21 through 22.

11 Your Honor, I can't think of any other way of  
12 answering the jury's question when they ask for evidence.  
13 All they are entitled to is evidence by giving them  
14 exhibits or testimony.

15 MR. O'BRIEN: I leave it to the Court's discretion.

16 THE COURT: You have to.

17 Bring in the jury and let me see their note.

18 Do you have the note, Mr. Marks?

19 MR. MARKS: I have it here. There are only two  
20 notes, is that correct?

21 MR. O'BRIEN: I waive the presence of the  
22 defendant, although I am not sure I can.

23 MR. MARKS: I think they should be here.

24 THE COURT: Yes, bring them up.

25 (Pause.)

A-47

1 THE COURT: I think we have to read the testimony.

2 MR. MARKS: They asked for Mr. King's first test.

3 MR. O'BRIEN: They may want the grand jury  
4 testimony. The only reference would be on 329.

5 THE COURT: We can't read the grand jury testimony.

6 MR. O'BRIEN: We have the minutes here in  
7 cross-examination.

8 THE COURT: There may be a reference.

9 MR. MARKS: Yes, your Honor, you have to ask  
10 them what they want.

11 Mr. O'Brien, 490, lines 13 through 20 for Floyd's,  
12 are we in agreement?

13 MR. O'BRIEN: Yes.

14 THE COURT: Bring the defendants in and the jury.

15 (The defendants are present in the court room.)

16 (The jury is in the jury box.)

17 THE COURT: Ladies and gentlemen, we have  
18 received from you now four notes and I want to take  
19 inventory and provide you with whatever information you  
20 requested.

21 The first note you sent in asked for one, pic-  
22 tures; two, calendar, both; three, driver's license;  
23 four, maps, both; five, bank diagram. I believe you  
24 have received all of those, is that correct?

25 THE FOREMAN: Yes.

A-48



1 THE COURT: The next note says street maps of  
2 Brooklyn and the addresses of the defendants. Then all  
3 pieces of evidence.

4 As to the street maps of Brooklyn, you have  
5 received those. All pieces of evidence, I interpreted  
6 that to mean all the exhibits which I directed to be  
7 sent in to you.

8 The question of the addresses of the defendants  
9 you gave us a further note on, and I will discuss it  
10 in a moment.

11 The next one which I have, Mr. King's first test.

12 THE FOREMAN: Testimony.

13 THE COURT: Do you mean his direct testimony?

14 THE FOREMAN: Yes.

15 THE COURT: entire direct testimony?

16 You will have to have that read to you.

17 And Mr. Floyd's statement as to where he lived.  
18 His testimony as to where he lived, is that what you  
19 are requesting? As to the addresses of the defendants  
20 which you requested in the exhibit I marked Court  
21 exhibit 4, Mr. Olivo testified, that was at page 655 --

22 MR. MARKS: On direct.

23 THE COURT: On direct testimony:

24 "Question: Where do you live?

25 "Answer: 1548 East New York Avenue."

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1 Mr. Floyd testified on direct , page 490:

2 "Question: Where were you?

3 "Answer: I was in my house on Myrtle Avenue,  
4 49 Myrtle Avenue.

5 "Question: 497?

6 "Answer: 497 Myrtle Avenue.

7 "Question: Is that your house?

8 "Answer: No, it ain't my house, it's my niece's  
9 house, Valerie Dickenson."

10 I believe that is the testimony you wanted read  
11 as to the addresses of the defendants. Is that correct?

12 Now, we have left the testimony, direct testi-  
13 mony of Mr. King.

14 MR. MARKS: Starting at page 110, your Honor.

15 Your Honor, would you like me to mark off the  
16 passages of colloquy and objected-to questions which  
17 shouldn't be read or isn't that necessary?

18 THE COURT: You follow me along. If you think  
19 I read something I shouldn't, say so. .

20 With the Reporter's permission, I will read  
21 back myself. Beginning at page 110, direct examination  
22 by Mr. Marks.

23 (At this time the above-referred-to testimony  
24 was read by the Court.)

25 THE COURT: That is the end of the direct exam-

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1 ination of Mr. King. Is that all the testimony you wish  
2 to have read at this time?

3 I ask you to retire and continue your delibera-  
4 tions.

5 (Jury left the court room.)

6 (continued next page.)  
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9/1

1 (The following occurred at 5:10 p.m. in the  
2 absence of the jury.)

3 MR. MARKS: Can we see the note, please? Can  
4 we know what the note says?

5 (Document referred to was received and marked  
6 Court's Exhibit 7.)

7 THE COURT: Mr. Marks and Mr. O'Brien, I have  
8 a note here from the jury which has been marked  
9 Court's Exhibit 7. This says the jury is deadlocked.  
10 I can show it to you.

11 It is now ten minutes after five. I received  
12 that note about five minutes of five.

13 What are your suggestions?

14 MR. MARKS: Well, I have two suggestions,  
15 your Honor, first the Government would request an  
16 Allen charge.

17 The second is, I would ask your Honor to  
18 inquire of the jury whether there is any part of  
19 your Honor's charge that the jury would like reread.

20 And alternatively, your Honor could reread  
21 the entire charge.

22 MR. O'BRIEN: Your Honor, I would certainly  
23 oppose your Honor rereading the charge. There is no  
24 question that the jury has not requested that. I  
25 would be opposed to an Allen charge. I normally

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1 an opposed to an Allen charge. I find it is coercive.  
2 I do not think -- I am opposed to an Allen charge.

3 The jury has said they are deadlocked. I  
4 would ask your Honor to discharge the jury and de-  
5 clare a mistrial.

6 MR. MARKS: I would vigorously oppose that  
7 application. It is much too early for that. After  
8 all this was a trial which lasted well over four  
9 trial days, four and a half trial days. They have  
10 been deliberating only since ten to one. It is now  
11 a quarter past five. It is much too early for the  
12 application for the declaration of a mistrial. I  
13 would request that your Honor ask the jury if they  
14 would like to have the charge reread, and if they  
15 think that would assist them.

16 MR. O'BRIEN: Your Honor, it is so clear in  
17 this case --

18 MR. MARKS: Just a moment.

19 MR. O'BRIEN: I am sorry.

20 MR. MARKS: I would also ask your Honor to  
21 give them an Allen charge.

22 MR. O'BRIEN: It seems so clear in this case,  
23 your Honor, because it is not a complicated case,  
24 that it is a question of credibility. I can see  
25 the jury having a series of questions about the

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1 credibility of the witnesses. It is not a complicated  
2 case. It is not a question where the law is going  
3 to -- there is an issue of law involved. It is clear  
4 that the jury just has questions about the credibility  
5 of both defense and prosecution witnesses. When they  
6 say they are deadlocked I would say to me that is  
7 exactly what they mean, that they are deadlocked.  
8

9 THE COURT: I am not prepared to accept it  
10 at this point, their simple statement that they are  
11 deadlocked. What I will do is I will call them back  
12 in and verify the note. I will urge them to return  
13 and deliberate further. I will not indicate how long  
14 I will hold them or whether I will bring them back  
15 tomorrow, or Monday, or what.

16 For your own information very likely if they  
17 have not reached a verdict by six o'clock or sometime  
18 shortly thereafter, I will then decide whether or  
19 not to give them an Allen charge, or require further  
20 deliberations, or see what else has to be done.

21 MR. MARKS: Your Honor, once again I would  
22 request that your Honor ask them-- to either reread  
23 your Honor's charge to them or ask them if they would  
24 like it to be repeated. There are a number of diffi-  
25 cult points here. Probably one of the most difficult  
points for the jury is how to deal with the absence

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1 of Edward Alvestica. That was dealt with in your  
2 Honor's charge in only three sentences. And I would  
3 imagine that would be something that would trouble  
4 the jury terribly.

5 THE COURT: Well, it may or may not.

6 I would ask them if a rereading of any portion  
7 of the charge would be of assistance.

8 I may decide to reread the portion about their  
9 deliberations.

10 MR. O'BRIEN: I don't know what portion that  
11 would be, your Honor.

12 THE COURT: The very end as to they should  
13 listen to each other and still make up their minds.  
14 The chances are they listened to that too closely.

15 Bring the jury in.

16 (The jury thereupon returned to the courtroom  
17 at 5:15 p.m.)

18 THE COURT: Ladies and gentlemen, I have your  
19 note which has been marked Court's Exhibit 7. It  
20 says that the jury is deadlocked.

21 I assume by this that at this point you have  
22 not been able to reach a unanimous verdict, is that  
23 correct?

24 JUROR NO. 1: Yes.

25 THE COURT: I do not want to know from you

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5  
1 and I do not want you to tell anyone what kind of  
2 division there is amongst you, that is whether it is  
3 eleven to one or six to six, or in what direction.  
4 I would like to know, however, whether you feel there  
5 is any possibility of reaching a unanimous verdict  
6 as to either of the defendants on either of the two  
7 counts by deliberating this matter any further.

8 JUROR NO. 6: I would say no, your Honor.

9 THE COURT: The case has involved up to this  
10 point a considerable investment in time and energy.  
11 You received it to deliberate on at about ten minutes  
12 of one. Since that time until now, that is, 5:20,  
13 you have had lunch. We have spent thirty to forty-  
14 five minutes rereading back to you certain testimony.  
15 I do not feel at this point that I can discharge you.  
16 I'm going to ask you to return to the jury room and  
17 to deliberate further. Only you know the points where  
18 you are in disagreement. But I would ask you if any  
19 one of the twelve of you think that a rereading of  
20 any portion of the testimony or any portion of the  
21 charge would assist you in resolving that disagreement.

22 None thinks that any part of it would help you?

23 JUROR NO. 3: We would have to discuss that.

24 THE COURT: Well, you will have an opportunity  
25 to do so.

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1  
2 If you think so, of course all you need to do  
3 is ask.

4 I'm going to ask you, though, to return to  
5 the jury room and continue your deliberations in an  
6 attempt to arrive at a unanimous verdict.

7 Now at this time I will reread to you a small  
8 portion of the charge which pertains to your deliber-  
9 ations. Possibly that may help you in arriving at  
10 a unanimous agreement:

11 Each of you, as jurors, is entitled to your  
12 own opinion, but each of you should exchange views  
13 with your fellow jurors.

14 That is the very purpose of jury deliberation --  
15 to discuss and to consider the evidence; to listen to  
16 the arguments of fellow jurors; to present your indi-  
17 vidual views; to consult with one another; and to  
18 reach an agreement based solely and wholly on the  
19 evidence, if you can do so without violence to your  
20 own individual judgment.

21 Each of you must decide the case for yourself  
22 and after consideration with your fellow jurors.

23 But you should not hesitate to change an opinion  
24 which, after discussion with your fellow jurors, appears  
25 to you to be erroneous.

However, if after carefully considering all the

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1 evidence and the arguments of your fellow jurors,  
2 you entertain a conscientious view that differs from  
3 others, you are not to yield your judgment simply  
4 because you are outnumbered.

5 Your final vote must reflect your conscientious  
6 view as to how the issues should be decided.

7 I am going to ask you to return to the jury  
8 room and continue your deliberations.

9 (The jury thereupon retired from the courtroom  
10 at 5:25 p.m.)

11 THE COURT: Yes, Mr. Marks.

12 MR. MARKS: Your Honor, it is apparent from  
13 the demeanor of the jury and from the response that  
14 your Honor got from Juror No. 6 that an Allen charge  
15 is going to be required.

16 MR. O'BRIEN: Your Honor, I did not see that --  
17 any reaction from the jury at all. They said -- most  
18 of them shook their heads when your Honor said would  
19 a charge be helpful. One juror, I think Juror No. 4,  
20 indicated to the Court that maybe they should discuss  
21 it before reaching a decision.

22 THE COURT: Well, the mere fact that a juror  
23 says we are not going to reach a verdict does not  
24 mandate an Allen charge.

25 I will consider whether or not I wish to give

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1 such a charge. It is not required.

2  
3 1. MARKS: Of course, your Honor. But I would  
4 request it.

5 THE COURT: Yes, I understand.

6 So we wait further action by the jury.

7 (Recess.)

8 (The following occurred at 5:45 p.m. in chambers.)

9 (Present: Mr. Marks, Mr. O'Brien, Helen  
10 Weintraub, alternate juror No. 2.)

11 2. MARKS: Your Honor, Mr. O'Brien and I were  
12 talking to Mrs. Weintraub while the jury was deliber-  
13 ating. She brought to my attention something which I  
14 think the Court ought to know which would call for a  
15 corrective instruction.

16 Mrs. Weintraub, could you please relate to the  
17 Judge what you told me about what happened on Wednesday.

18 MRS. WEINTRAUB: Yes. Up until Wednesday we  
19 were not escorted out of the courtroom into the ele-  
20 vator. Wednesday evening we were escorted to the  
21 elevator by one of the guards. And as we walked --

22 MR. MARKS: Can you identify that guard?

23 MRS. WEINTRAUB: I don't know his name. It  
24 was a heavysset man with gray hair.

25 MR. MARKS: I think that would be Mr. Levy.

MRS. WEINTRAUB: As we were waiting for the

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13 1 that, and what we have on our hands right now is one  
2 or more jurors who are scared of rendering a guilty  
3 verdict.

4 I would ask your Honor to instruct the jury  
5 to the effect that they have nothing to fear. After  
6 all it is part of their oath that they are to render  
7 a verdict without fear or favor.

8 I would ask that your Honor elaborate on that.

9 MR. O'BRIEN: Your Honor, my feelings are that  
10 the defendants could very well be prejudiced by it  
11 also. Their fear that -- Mrs. Weintraub saying th  
12 no one was aware of the ropes -- I am willing to  
13 accept that -- that no one was aware, you know, of  
14 the ropes. But right from the beginning I had  
15 questioned in my mind that if the jurors got the  
16 impression that these were dangerous people or that  
17 they had anything to fear for themselves certainly  
18 that could prejudice the Government and it could  
19 equally prejudice the defendant. And it could work  
20 the exact opposite effect on certain people. Cer-  
21 tain people may be afraid to give a not guilty  
22 verdict. Their feelings may be they would give a  
23 guilty verdict only because of that, or that they  
24 may be considering that fact. I don't know whether  
25 any of us can say actually what effect it would

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14

1 have on the jury.

2 I would certainly be opposed to any instruction  
3 because I think all that does is highlight the issue.  
4 And I seriously think that possibly a mistrial is in  
5 order, especially in view of the fact that the jury  
6 has said they are deadlocked.

7 I would be very candid with your Honor and say  
8 if the jury comes back with a guilty verdict, at this  
9 time I would want to question the jury and hold a  
10 hearing as to whether or not they were prejudiced by  
11 being escorted from the building, or whether that  
12 even entered into their deliberations.

13 THE COURT: We have been concerned with secu-  
14 rity in this trial prior to its beginning. Having  
15 the security creates inevitable problems as we know  
16 throughout the trial. I believe even while we were  
17 picking a jury, the suggestion of -- I think it was  
18 of Mr. Marks -- I stopped asking the specific addresses  
19 of prospective jurors and only asked them the general  
20 location of where they lived to help eliminate or  
21 minimize the potential threat to a juror. So the  
22 matter has been of some concern. We have the problem  
23 I believe on two occasions of jurors getting to the  
24 front of the courtroom making telephone calls and  
25 possibly seeing security arrangements which were made  
there.

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15

1 I think it would be asking too much in an im-  
2 perfect world to expect that the precautions which we  
3 have taken which I think at least the United States  
4 Attorney and I have felt were advisable under the cir-  
5 cumstances -- is too much to expect that they could  
6 be there and not be perceived in some way by the jurors.  
7 It is quite obvious that we have at least three mar-  
8 shals in the courtroom at all times. I do not think  
9 the ones in the back of the court were quite that  
10 obvious.

11 In the overall picture I do not think that the  
12 incident which Mrs. Weintraub has described is signifi-  
13 cant enough by itself to warrant the declaration of  
14 a mistrial. It seems to me that it raised questions  
15 in the jurors -- most of whom indicated they were  
16 inexperienced with courtroom procedures -- they were  
17 in an unfamiliar kind of situation. Two days they  
18 had left the courtroom prior to Wednesday, and while  
19 we had directed them to go around the back way, appar-  
20 ently the marshal didn't give them any specific in-  
21 structions at the elevator. And then the third day,  
22 Wednesday, he said, "Everybody get on the elevator."  
23 And I would assume that the jurors would have drawn  
24 a conclusion from that that there was a reason why he  
25 asked them to do so. I'm sure, being human and being

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16

1 curious, that it might give them some thoughts, par-  
2 ticularly after a day when the courtroom was -- I  
3 think Mr. Weintraub was correct -- there were a fairly  
4 large number of black people sitting as observers in  
5 the courtroom which was different from what it was  
6 the first two days.

7 These are things in a public trial you can't  
8 control. But I do not think it rises to the level of  
9 a mistrial, at least based upon what Mrs. Weintraub  
10 said.

11 I do not think it is fair to the defendants to  
12 call the jury in and say, "Look, you don't have any-  
13 thing to be afraid of here to bring in a verdict."  
14 Obviously they are not afraid of the marshals or the  
15 FBI. I'm afraid it looks more like strong-arming a  
16 verdict. And I certainly do not want to do that.

17 What I will do at this point, in other words,  
18 is nothing.

9/2

19 It is six o'clock now. I have decided that I  
20 will not give an Allen charge.

21 I must feel in the context of this particular  
22 case, partly for the reasons you mentioned, Mr. O'Brien,  
23 that we are not dealing with a complex case. The  
24 issue is quite clearcut. Either you believe King or  
25 you don't. By reason of that, they may well be hung

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15

1 on this point-- you either believe him beyond a rea-  
2 sonable doubt or you don't believe beyond a reasonable  
3 doubt.  
4

5 They have had now probably two and a half hours  
6 of good discussion. They did send out for cokes and  
7 cookies, and so forth, when I sent them back in. So  
8 I guess they intended to settle down to work. I think  
9 I will give them a reasonable period longer. And if  
10 they do not reach a verdict by then -- well, I will  
11 put it this way, I am not prepared to discharge them  
12 on my own motion at this time. But if a motion by  
13 the defense were to be made for a mistrial I would  
14 seriously consider it. I do not think anything would  
15 be gained by bringing them back on Monday, or by  
16 bringing them back tomorrow. I have pressured them.  
17 It is Friday afternoon on a summer's weekend. It is  
18 after six o'clock now. I am sure they have got fam-  
19 ilies at home. There are some pressures urging them  
20 to reach a decision. If they do not reach it within  
21 the next half hour I am sure it is because there are  
22 conscientious differences of opinion.

23 MR. MARKS: Your Honor, all of us have had  
24 many trials in which after a much longer period of  
25 deliberation the jury has sent notes out saying that  
the are at deadlock. And ultimately when given the

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16

1 time to deliberate further they have been able to  
2 render a verdict. I think, considering the amount  
3 of evidence that has gone in in this case, a motion  
4 by the defense for a mistrial at this early stage  
5 would be terribly premature. And I would respect-  
6 fully ask your Honor to have the jury come back to-  
7 morrow to continue their deliberations in the event  
8 that they are not able to render a verdict this  
9 evening.

10 THE COURT: How late do you think I should hold  
11 them this evening?

12 MR. MARKS: Well, because it is Friday, and  
13 I do not think I wish to coerce them, I think perhaps  
14 until six-thirty, and then to continue their deliber-  
15 ations tomorrow morning.

16 MR. O'BRIEN: I would be opposed to that. I  
17 can see, your Honor, if you want to hold them to say  
18 seven o'clock. There has not been much evidence in  
19 this case. There is not a lot of evidence. The  
20 real key issue is, as I think your Honor put it, on  
21 the credibility of Mr. King.

22 And even speaking with the alternate juror,  
23 she pretty much advises that she did not believe the  
24 defendants or their girl friends.

25 She also indicated that prior to summations

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1 that she probably would have voted guilty.

2 In situations I think we all harbor on the  
3 credibility of Mr. King. And I think that is, we  
4 know, what the issue is. And it just seems clear to  
5 me that if one person says I believe him and the  
6 other person says I do not believe him, I do not see  
7 how a person can change his mind on that. It is not  
8 a question of weighing the arguments, or one juror  
9 convincing another. When it is a question of believ-  
10 ability you either believe somebody or you have doubt.  
11 And they can deliberate for five hours or five days,  
12 and I think it remains the same.

13 MR. MARKS: It is actually more complicated  
14 than that. Of course it is very difficult to gauge  
15 at what the jury is thinking, what problems they are  
16 having, simply on the basis of one alternate juror's  
17 view of the case, but Mrs. Weintraub did tell us that  
18 at least -- and I am not sure whether she said this  
19 was her opinion or it was the opinion of her fellow  
20 jurors, that there was grave concern on -- over the  
21 fact that Edward Alvestica was not called as a wit-  
22 ness. Everybody was wondering, even after your Honor  
23 charged the jury as to his unavailability, where he  
24 was, and why he wasn't called. And that was a big  
25 problem.

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18

1 THE COURT: Well, the problem in her mind is  
2 a problem for you. I would say it is probably not  
3 a problem for the defense. It is perhaps an advantage.  
4 Although we don't know what would have happened had  
5 we called him to the witness stand and let the show  
6 go on as to his refusing or not refusing to testify  
7 when I directed him to.

8 MR. MARKS: Would your Honor entertain a  
9 request again that the Court reread the charge to  
10 the jury?

11 MR. O'BRIEN: Your Honor, I think that it is  
12 entirely improper to do so unless the jury requests  
13 it.

14 In addition to that, in the light of recent  
15 developments, with the possibility of fear involved,  
16 I question whether the jury must think that Mr.

17 Alvesticais not available because he may be dead or  
18 injured. I don't know whether the jury is sophisti-  
19 cated enough to realize that he may just have refused  
20 to testify. And I do not think that --

21 THE COURT: Or can't be found.

22 MR. O'BRIEN: Or can't be found, that is true.  
23 I hadn't thought of that possibility at the moment.

24 THE COURT: Well, the fact that both of you  
25 seem to think you are prejudiced by the various events

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19

1 we have been discussing here makes me think that  
2 probably I should not take a drastic action based  
3 on any of it.

4 MR. O'BRIEN: Your Honor, in view of everything  
5 I feel that a mistrial would probably be the right  
6 course to follow.

7 MR. HARKS: I think it is much too early.

8 MR. O'BRIEN: I am not just talking about time.  
9 If you talk about possible prejudice, I am not even  
10 sure which side is prejudiced. I wish I knew which  
11 side is prejudiced.

12 MR. HARKS: If I were on the jury I sure would  
13 know which side was prejudiced.

14 MR. O'BRIEN: Well, not necessarily, because I  
15 think -- I would not want the jury believing -- if I  
16 were a defendant I wouldn't want the jury believing  
17 I am a dangerous enough person to have them injured.  
18 I think it might very well push me the other way and  
19 say that if I have to worry about fear there is no  
20 question that these people are guilty, and then out  
21 of a sense of duty I think I would come to the conclu-  
22 sion that I have to convict them because they are  
23 definitely guilty because now I am in fear of some-  
24 thing happening to me. If they were innocent I would  
25 have nothing to fear.

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26

1 THE COURT: We don't know that much about any  
2 of the jurors and never will.

3 I think we will just let them do their duty  
4 up there for a little while longer at least and let's  
5 see what happens.

6 MR. O'BRIEN: Yes, your Honor.

7 THE COURT: They may reach a verdict; they may  
8 not. And then we may have to do something. I cer-  
9 tainly will not hold them today beyond seven o'clock.

10 MR. O'BRIEN: Yes, sir, thank you.

11 THE COURT: They are not to know about that.

12 MR. O'BRIEN: Of course not.

13 MR. MARKS: Thank you for seeing us in chambers,  
14 Judge.

15 THE COURT: Very good.

16 (Recess.)

17 (After recess.)

18 (The following occurred at 6:56 p.m. in open  
19 court in the absence of the jury.)

20 (Document was received and marked Court's  
21 Exhibit 8.)

xxx

22 THE COURT: Gentlemen, at about a quarter to  
23 seven, and it is now two minutes of seven, I received  
24 another note from the jury which has been marked  
25 Court's Exhibit 8. It says: "The jury is dead-  
locked."

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21

(Documents received and marked Court's Exhibits 9 and 10 respectively.)

THE COURT: Shortly after that the marshal gave me a sheet of paper, which is now in two parts, marked Court's Exhibits 9 and 10, and it is written requests by various jurors to call various people and tell them that they are going to be a while.

I took the liberty of asking the law clerks to make telephone calls without calling you back into session. They have all been made except two people who weren't at home.

At this point I am going to call the jury back and ask them once again if -- I will ask them whether they have made any progress. And let's see what their answer is.

MR. O'BRIEN: Your Honor, in the event that the jury indicates that they do not think they can reach a verdict, I would definitely move for a mistrial for the reasons I have already related.

MR. MARKS: Your Honor, this may take a while -- let me just see if I can articulate my thought. This has been really an emotionally charged day for this jury. We started about nine o'clock with loads of summations, mainly by the Government, and then your Honor's charge. And about at ten to one they

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1  
22 went into the jury room. In fact they had lunch in  
2 the jury room which we can assume took forty minutes  
3 or so. So as a practical matter they haven't been  
4 deliberating all that long. They started delibera-  
5 ting, say, at one-thirty. They ordered coffee and  
6 cake at one point. Considering the amount of evidence  
7 and the emotion charge of the day I think it is too  
8 early to grant the defendants' request for a mistrial.

9  
10 Earlier in chambers I had asked your Honor  
11 to consider bringing the jury back tomorrow. I think  
12 that perhaps the better course is to dismiss the jury  
13 for the evening and to ask them to come back Monday  
14 morning when they are well rested and ask them to  
15 give another try.

16 I have had many trials in this courthouse,  
17 your Honor, in which jurors, even in similar simple  
18 cases, have taken much longer to reach a verdict than  
19 in this case. It is not at all uncommon for a jury  
20 to take as long as fourteen hours to reach a verdict.  
21 And while I frequently have heard of premature motions  
22 for a mistrial as the jury comes in with a note to the  
23 effect that they are deadlocked, those motions are  
24 generally not granted until the jury is given an  
25 adequate opportunity to reach a verdict. They haven't  
been at this that long at this point.

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23

1 So once again I would just request that your  
2 Honor discharge the jury for the evening and ask them  
3 to come back on Monday morning. If at the end of the  
4 day on Monday at a reasonable hour, if they haven't  
5 been able to reach a verdict then your Honor can  
6 consider a motion for a mistrial.

7 THE COURT : They will have to return on Monday  
8 in any event because their jury service is not con-  
9 cluded. The question is whether they ought to convene  
10 here for their deliberations or go back to the jury  
11 vault --

12 MR. O'BRIEN: Well, it would seem to me --

13 MR. MARKS: If I may just say this, what harm  
14 really is there in having them continue their deliber-  
15 ations on Monday?

16 THE COURT: There is potential harm possibly.  
17 No one knows possibly how the jurors' mind works.  
18 Certainly I could keep them in there with the air  
19 conditioning turned off and the temperature would  
20 reach 80 degrees. If I kept them there at night late  
21 it would be like forcing a confession out of them.  
22 It is not just the way the system works. It is not  
23 fair to the jury to compel an agreement from them.

24 I have instructed them, and I believe I have  
25 instructed them if they sincerely believe this is their

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1 best judgment, "I am not certain it is fair to say  
2 you have got to change your judgment, whether I say  
3 it in words or otherwise, and say you have got to come  
4 back tomorrow or Monday, or whatever. I think what  
5 I would like to do, and I have considered everything  
6 you have said, Mr. Marks, and what you have said,  
7 Mr. O'Brien, many other things, and I think I will  
8 call them back and try to determine from the jury  
9 whether any further deliberations on Monday would  
10 be of assistance to them.

11 MR. MARKS: Your Honor, I am not sure that the  
12 jury is in the proper frame of mind to make an eval-  
13 uation of that sort at this point because not only  
14 have they been subjected to emotional summation --

15 THE COURT: Just a moment.

16 (Jury note sent into the courtroom.)

17 THE COURT: "Direct and cross-examination of  
18 Floyd Olivo."

19 MR. MARKS: So there we have it. That cer-  
20 tainly supports --

21 THE COURT: I think there is no alternative.  
22 I will call them in and I will excuse them to convene  
23 Monday morning.

24 MR. O'BRIEN: Your Honor, may I have an affi-  
25 davit of engagement --

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1 THE COURT: There is no way that they can stay  
2 an hour or an hour and a half to read the direct and  
3 cross-examination of both witnesses. I suspect the  
4 jury knows that too. That is why they have requested  
5 it at this point. However we must assume the request  
6 is made in good faith.

7 MR. O'BRIEN: Yes, your Honor.

8 THE COURT: I will call them in and dismiss  
9 them until Monday morning.

10 MR. O'BRIEN: Your Honor, may I have -- well,  
11 we can do this later -- but I would like an affidavit  
12 of engagement. I'm scheduled to start a trial by  
13 Monday. Thank you.

14 THE COURT: Maybe Mr. Warburgh can come in for  
15 you.

16 Bring the jury in.

17 (The jury thereupon returned to the courtroom  
18 at 7:07 p.m.)

19 THE COURT: Ladies and gentlemen, first off  
20 I have your requests to make certain phone calls. I  
21 had my law clerks make those phone calls. And with  
22 two exceptions they reached the parties that you  
23 requested and informed them that you would be leaving  
24 the courthouse in the vicinity of seven o'clock.  
25 The two that they did not reach were "Call Ray,

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1  
26 2 say now is delayed" and "Aronda" is the name. That  
3 is one. And the other is the request to call Kathleen  
4 McCormick.

5 (Document referred to was received and marked  
6 Court's Exhibit 11.)

7 THE COURT: Now I have your request, Court's  
8 Exhibit 11, requesting that the direct and cross-  
9 examination of the defendants Lloyd and Olive be read.  
10 We will not do that this afternoon.

11 I considered bringing you back tomorrow but I  
12 think that you have already put in enough time and  
13 energy in this case. It has been a long day. It  
14 wouldn't be fair to you, perhaps not to the attorneys  
15 and other people involved in the case. That would  
16 require you to give up a Saturday as well. You have  
17 to come back next week for the remainder of your jury  
18 term. So we will recess until nine o'clock Monday  
19 morning, at which time the testimony which you requested  
20 will be read to you.

21 Now, we are going to have a weekend. It is of  
22 even greater importance now that you are in your de-  
23 liberations that you not discuss this case amongst  
24 yourselves or with anyone else from now until the time  
25 you come back to the courtroom to hear that testimony  
read and then retire for further deliberations. Even

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27

1 when you come back here on Monday morning and you are  
2 waiting to be called into the courtroom, do not dis-  
3 cuss the case amongst yourselves until you've come  
4 back and hear this testimony and get back into the  
5 jury room for further discussion. That is very im-  
6 portant. I urge you to follow my instructions in that  
7 regard. So you have heard a lot of talk today. You  
8 are not going to hear any more. You are excused until  
9 nine o'clock Monday morning.

10 JUDGE NO. 3: Sir, I think we have got a problem  
11 also. We had a discussion after that note was sent  
12 in and we came up with a deadlock decision.

13 THE COURT: Well, I think I have your request.  
14 Someone within the last ten minutes or so has requested  
15 that this testimony be read. I think we will proceed  
16 as I instructed and we will see you here Monday morn-  
17 ing at nine o'clock. Thank you very much.

18 ( The jury thereupon retired from the court-  
19 room at 7:16 p.m.)

20 MR. O'BRIEN: Your Honor, I think that the fear  
21 that your Honor expressed that the note could possibly  
22 be a sham and they just wanted to force the Court  
23 into -- the Court and defense counsel and the prose-  
24 cutor -- to get them go tonight -- is true. It seems  
25 apparent to me that that note was not sent out in good

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28

1 faith, the fact that they are deadlocked again.

2 I renew my motion for a mistrial.

3 THE COURT: Well, at this time, Mr. O'Brien,  
4 I will deny the motion.

5 As I said, the jury does have to come back on  
6 Monday morning anyway. It is not a severe imposition  
7 on them. If they are still deadlocked after they have  
8 heard the testimony read then obviously there is very  
9 little that can be done.

10 MR. O'BRIEN: Very well.

11 THE COURT: We have already -- I did not give  
12 the Allen charge. But there is nothing in it which  
13 is contrary to fact, the heavy stake involved both of  
14 a financial and emotional nature that have already  
15 been invested in the case, the hours involved in the  
16 case. And I do not believe that it should result in  
17 compelling a decision out of the jury. They are  
18 relieved of the responsibility over the weekend. They  
19 will get another shot at it Monday morning. If it  
20 doesn't work then I will entertain a motion for a mis-  
21 trial.

22 MR. O'BRIEN: Yes, your Honor.

23 THE COURT: Thank you very much, gentlemen.

24 (Thereupon at 7:15 o'clock p.m. an adjournment  
25 was taken Monday, June 28, 1976 at 9:00 o'clock a.m.)

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1  
2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 -----  
5 UNITED STATES OF AMERICA, :

6 -against- :

76-CR-296

7 LAMONT FLOYD and PETER OLIVO, :

8 Defendants. :

9 -----  
10 United States Courthouse  
11 Brooklyn, New York

12 June 23, 1976  
13 10:00 o'clock A.M.

14  
15 B e f o r e :

16 HONORABLE GEORGE C. PRATT, U.S.D.J.  
17

18  
19  
20  
21  
22  
23  
24 JOSEPH BARBELLA  
25 OFFICIAL COURT REPORTER

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1  
2 Appearance:

3  
4 DAVID G. TRACER, ESQ.  
5 United States Attorney  
6 for the Eastern District of New York

7 BY: JONATHAN MARKS, ESQ.  
8 Assistant U.S. Attorney

9 PAUL WALBURN, ESQ.  
10 Attorney for Defendant Floyd

11 THOMAS O'BRIEN, ESQ.  
12 Attorney for Defendant Olive  
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1 (The following took place in the absence of the  
2 jury.)

3 THE COURT: Well, with respect to the Allen  
4 charge, you objected to it on Friday, Mr. O'Brien.

5 MR. O'BRIEN: I did.

6 THE COURT: Mr. Warburgh says maybe we ought to  
7 use it. Mr. Marks thinks it ought to be used.

8 MR. MARKS: But not until they have had a chance  
9 to deliberate after they have heard all the testimony.

10 THE COURT: You still feel that you would rather  
11 not have it used?

12 MR. O'BRIEN: Your Honor, when would your Honor  
13 intend to use the -- If I agree to have it used?

14 THE COURT: I really haven't got to the point of  
15 determining that. If there is a point at which you  
16 gentlemen can agree it would be used, I will use it at  
17 that point.

18 MR. O'BRIEN: May I have two minutes to confer  
19 with Mr. Warburgh?

20 THE COURT: Surely.

21 (Whereupon, Mr. O'Brien and Mr. Warburgh confer  
22 privately.)

23 MR. O'BRIEN: Your Honor, I would withdraw my  
24 objection to a watered-down Allen charge. I still  
25 think that the Allen charge as originally stated in

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1 United States against Allen is somewhat too coercive or  
2 coercive and I feel a watered-down version would remind  
3 them of their responsibilities without having any  
4 prejudice to the defendant.

5 MR. WARBURGH: I agree.

6 THE COURT: I understand that both Judge Mishler  
7 and Judge Deoling have a form of watered-down Allen  
8 charge. I will ask my law clerk to run those down and  
9 look them over while the testimony is being read.

10 MR. MARKS: I don't think --

11 THE COURT: Before I give it, I will see if you  
12 have any objection to it.

13 MR. O'BRIEN: Yes, your Honor.

14 MR. MARKS: I would like to put my position on  
15 the record. It is simply that I don't think the jury  
16 should be given an Allen charge until they have a rea-  
17 sonable amount of time to deliberate, until they have  
18 heard the testimony.

19 THE COURT: Oh, I would agree with that. We will  
20 read them the testimony and then give them an hour or  
21 so.

22 MR. MARKS: I think the record should show that  
23 the Court has corrected the transcript on page 666, line  
24 14. It now reads:

25 "Have you ever used any other name?"

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1 "The Witness holds no.

2 "Question: Peter Archilda?

3 "Answer: Yes."

4 Is that a correct version?

5 THE COURT: That's with the agreement of all  
6 Counsel?

7 MR. WARBURGH: Yes.

8 THE COURT: Mr. Reporter, that's what it looks  
9 like when you get to it. If you get to it. I may do  
10 it.

11 All right, all we need is the defendant.

12 (Recess taken.)

13 (Whereupon, the defendants entered the court  
14 room.)

15 THE COURT: Gentlemen, are we ready to go?

16 MR. O'BRIEN: Yes, your Honor.

17 MR. MARKS: Yes, your Honor.

18 THE COURT: All right, bring in the jury.

19 (Whereupon, the jury entered the court room.)

20 THE COURT: Good morning. I hope you enjoyed  
21 the weekend.

22 Well now, pursuant to your request, we will have  
23 read to you the direct and cross examination of the  
24 defendants, Lamont Floyd and then Peter Olivio. The  
25 Reporter is going to read Mr. Floyd's testimony. I

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1 read Mr. Olivo's. That way no one's vocal chords will  
2 be unduly taxed.

3 All right, Mr. Reporter.

4 (Whereupon, the direct and cross-examination of  
5 the defendant, Lambert Floyd, was read.)

6 THE COURT: All right, that concludes Mr. Floyd's  
7 testimony.

8 MR. MARKS: 655, your Honor.

9 THE COURT: This will be the direct testimony of  
10 Peter Olivo.

11 (Direct testimony of defendant Peter Olivo read  
12 by the Court.)

13 THE COURT: That concludes the direct examination  
14 of Mr. Olivo. Cross-examination by Mr. Marks.

15 (Record read.)

16 THE COURT: And then we skip ahead to page 674,  
17 line 23.

18 (Record read.)

19 THE COURT: We go forward to page 679.

20 (Record read.)

21 THE COURT: Redirect examination by Mr. O'Brien.

22 (Record read.)

23 THE COURT: That concludes Mr. Olivo's testimony.

24 Now, ladies and gentlemen, we have read back to  
25 you as you requested the testimony of both the defend-

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1 ants. And now I will ask you to retire again to the  
2 jury room to continue deliberations.

3 (Whereupon, the jury retired from the court room.)

4 (Recess taken.)

5 THE COURT: You have seen the note?

6 MR. WARBURGH: Yes.

7 THE COURT: I am prepared to give the instruction  
8 that is included in Devitt and Blackmar which -- and I  
9 have not specifically read the Allen case -- but under  
10 the circumstances that we are faced with here, the  
11 instructions are not unreasonable or prejudicial to  
12 either side.

13 MR. O'BRIEN: Your Honor, may I see the instruc-  
14 tions?

15 THE COURT: Surely.

16 One jury note marked as Court exhibit 12.

17 MR. O'BRIEN: I have no objection to the charge.

18 MR. WARBURGH: No objection.

19 MR. MARKS: No objection.

20 THE COURT: All right.

21 THE CLERK: We are waiting for the defendants to  
22 come up.

23 THE COURT: All right.

24 (recess taken.)

25 (Whereupon, the defendants entered the court room.)

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1 THE COURT: All right, bring in the jury.

2 (Whereupon, the jury entered the court room.)

3 THE COURT: Ladies and gentlemen, I have received  
4 your note, which has been marked Court exhibit 12, which  
5 was delivered to me ten or fifteen minutes after you  
6 retired for further deliberations. I want to give you  
7 some further instructions which has been reviewed by  
8 the attorneys and to which they have no objection.

9 I wish to suggest to you a few thoughts with  
10 which you may desire to consider in your deliberations,  
11 along with all the other evidence and all the instruc-  
12 tions previously given.

13 This is an important case. The trial has been  
14 extensive in time, and effort, and money, to both the  
15 defense and the prosecution. If you should fail to  
16 agree on a verdict, the case is left open and undecided.  
17 Like all cases, it must be disposed of some time. There  
18 appears no reason to believe that another trial would  
19 not be costly to both sides. Nor does there appear  
20 any reason to believe the case can be tried again, by  
21 either side, better or more exhaustively than it has  
22 been tried before you. Any further jury must be sel-  
23 ected in the same manner and from the same source as  
24 you have been chosen. So, there appears no reason to  
25 believe that the case would ever be submitted to twelve

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1  
2 and women more conscientious, more impartial, or more  
3 competent to decide it, or that more or clearer evidence  
4 could be produced on behalf of either side.

5 Of course these things suggest themselves upon  
6 brief reflection, to all of us who have sat through  
7 this trial. The only reason they are mentioned now is  
8 because some of them may have escaped your attention,  
9 which must have been fully supplied up to this time in  
10 reviewing the evidence in the case. They are matters  
11 which, along with other and perhaps more obvious ones,  
12 remind us how desirable it is that you unanimously  
13 agree upon a verdict.

14 As stated in the instructions given at the time  
15 the case was submitted to you for decision, you should  
16 not surrender your honest convictions as to the weight  
17 or effect of evidence, solely because of the opinion  
18 of other jurors or for the mere purpose of returning  
19 a verdict.

20 However, it is your duty as jurors to consult  
21 with one another, and to deliberate with a view to  
22 reaching an agreement, if you can do so without violence  
23 to individual judgment. Each of you must decide the  
24 case for yourself, but you should do so only after a  
25 consideration of the evidence in the case with your

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1  
2 fellow jurors. And in the course of your deliberations  
3 you should not hesitate to re-examine your own views,  
4 and change your opinion if convinced it is erroneous.

5 In order to bring twelve minds to an unanimous  
6 result, you must examine the questions submitted to you  
7 with candor and frankness, and with proper regard to  
8 and regard for the opinions of each other. That is to  
9 say, in conferring together, each of you should pay due  
10 attention and respect to the view of the others, and  
11 listen to each other's arguments with a disposition  
12 to re-examine your own views.

13 If much the greater number of you are for a  
14 conviction, each dissenting juror ought to consider  
15 whether a doubt in his or her own mind is a reasonable  
16 one, since it makes no effective impression upon the  
17 minds of so many other equally honest, equally conscientious  
18 fellow jurors, who bear the same responsibility,  
19 serve under the same oath, and have heard the same  
20 evidence with, we may assume, the same attention and an  
21 equal desire to arrive at the truth. On the other hand  
22 if a majority or even a lesser number of you are for  
23 acquittal, other jurors ought seriously to ask themselves  
24 again, and most thoughtfully, whether they do  
25 not have reason to doubt the correctness of a judgment.

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which is not concurred in by many of their fellow jurors, and whether they should distrust the weight and sufficiency of evidence, which fails to convince the minds of several of their fellows beyond a reasonable doubt.

You are not partisans. You are judges -- judges of the facts. Your sole interest here is to seek the truth from the evidence in the case. You are the exclusive judges of the credibility of all the witnesses, and of the weight and effect of all the evidence. In the performance of this high duty, you are at liberty to disregard all comments of both Court and Counsel, including, of course, the remarks I am now making.

Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience. Remember, too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of "not guilty."

In order to make a decision more practicable, the law imposes the burden of proof on one party or

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1  
2 the other, in all cases. In the present case, the  
3 burden of proof is on the Government.

4 Above all, keep constantly in mind that unless  
5 your final conscientious appraisal of the evidence in  
6 the case requires it, the accused should never be  
7 exposed to the risk of having to run twice the gauntlet  
8 of a criminal prosecution; and to endure a second time  
9 the mental, emotional and financial strain of a criminal  
10 trial.

11 You may conduct your deliberations as you  
12 choose, but I suggest that you now carefully re-examine  
13 and reconsider all the evidence in the case bearing  
14 upon the questions before you.

15 You may be as leisurely in your deliberations  
16 as the occasion may require; and you shall take all of  
17 the time that you feel is necessary.

18 You may now retire and continue your deliberations,  
19 in such manner as shall be determined by your good and  
20 conscientious judgment as reasonable men and women.

21 I will ask you to retire and deliberate further.

22 (Whereupon, the jury retired from the court  
23 room.)

24 (Whereupon, the defendants retired from the  
25 court room.)

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1 THE COURT: Everybody has their guesses.

2 MR. O'BRIEN: That's right. We are all probably  
3 somewhat wrong.

4 THE COURT: Do you gentlemen have any suggestion  
5 as to anticipated course of conduct or do we simply  
6 wait and see what happens?

7 MR. O'BRIEN: Your Honor, if the jury is still  
8 deadlocked, should they send out one more note, I think  
9 I will have no alternative but to move for a mistrial.  
10 I don't want it, but --

11 THE COURT: No, none of us want a mistrial.  
12 There's been too much that has gone into the case. But  
13 as I said before, they seem to be wholly deadlocked.  
14 There is something more than just an evaluation of the  
15 evidence that is going in. We just don't know what it is.

16 MR. O'BRIEN: I would agree.

17 THE COURT: Well, let's see what they do.

18 MR. MARKS: Has lunch been ordered?

19 THE COURT: I beg your pardon?

20 MR. MARKS: Has lunch been ordered for them?

21 THE COURT: No, it has not yet.

22 MR. O'BRIEN: Your Honor, I would ask that lunch  
23 be withheld for some period -- I don't mean it that way,  
24 but what I am saying is I think if we went in there  
25 immediately and started taking their luncheon orders I

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1 think they're going to say, "Well, we are going to stay  
2 here at least for lunch."

3 THE COURT: On the other hand, if we don't order  
4 lunch for them -- if we order it now, according to the  
5 Clerk, they wouldn't get it until 1:30, anyway.

6 THE CLERK: Mr. O'Leary, would you concur in that?

7 THE DEPUTY MARSHALL: Yes.

8 THE COURT: I think we'd better give them the  
9 luncheon orders.

10 MR. WATKINS: Would your Honor permit for lunch  
11 to be brought in for the defendants? My client does  
12 not eat pork, some sort of his personal philosophy.

13 THE COURT: We handled that on Friday.

14 THE DEPUTY MARSHALL: As long as you pick it up  
15 and bring it to room 172, you can drop it off.

16 THE COURT: Yes. All right, we will wait for  
17 the next note.

18 MR. O'BRIEN: Yes, your Honor.

19 (Luncheon recess taken.)

20 (continued next page.)  
21  
22  
23  
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of life  
pr.

1 THE COURT: Gentlemen, we have a note. It has  
2 been marked Court Exhibit 13, which says the jury has  
3 arrived at a verdict.

4 Would you bring the jury in, please.

5 (The jury entered the courtroom.)

6 THE COURT: Ladies and gentlemen, I understand  
7 from your note that you have arrived at a verdict.

8 MADAM FORELADY: Yes.

9 THE COURT: Mr. Clerk, will you receive the  
10 verdict, please.

11 THE CLERK: Madam Forelady, will you please  
12 stand.

13 Madam Forelady, ladies and gentlemen of the jury,  
14 have you agreed upon a verdict?

15 MADAM FORELADY: Yes.

16 THE CLERK: How do you find the defendant, Lamon  
17 Floyd, as to Count 1 of the indictment? Guilty or not  
18 guilty?

19 MADAM FORELADY: Guilty.

20 THE CLERK: How do you find the defendant, Peter  
21 Olive, as to Count 1 of the indictment?

22 MADAM FORELADY: Guilty.

23 THE CLERK: How do you find the defendant, Lamon  
24 Floyd, as to Count 2 of the indictment?

25 MADAM FORELADY: Guilty.

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1 THE CLERK: Now do you find the defendant, Peter  
2 Olive, as to Count 2 of the indictment?

3 JUROR NO. 1: Guilty.

4 THE CLERK: So say you all.

5 THE COURT: Having received your verdict, you, the  
6 jury, find the defendant guilty as to both counts and  
7 so say you all.

8 (Whereupon the jurors answered in the affirmative.)

9 MR. ATTORNEY: Now the jury be individually polled?

10 THE COURT: Yes. Yes, Clerk, will you poll the  
11 jury individually?

12 THE CLERK: Juror No. 1, is that your verdict?

13 JUROR NO. 1: Yes, it is.

14 THE CLERK: Juror No. 2, is that your verdict?

15 JUROR NO. 2: Yes.

16 THE CLERK: Juror No. 3, is that your verdict?

17 JUROR NO. 3: Yes.

18 THE CLERK: Juror No. 4, is that your verdict?

19 JUROR NO. 4: Yes, sir.

20 THE CLERK: Juror No. 5, is that your verdict?

21 JUROR NO. 5: Yes, sir.

22 THE CLERK: Juror No. 6, is that your verdict?

23 JUROR NO. 6: Yes.

24 THE CLERK: Juror No. 7, is that your verdict?

25 JUROR NO. 7: Yes.

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1 THE CLERK: Juror No. 8, is that your verdict?

2 JUROR NO. 8: Yes.

3 THE CLERK: Juror No. 9, is that your verdict?

4 JUROR NO. 9: Yes.

5 THE CLERK: Juror No. 10, is that your verdict?

6 JUROR NO. 10: Yes.

7 THE CLERK: Juror No. 11, is that your verdict?

8 JUROR NO. 11: Yes.

9 THE CLERK: Juror No. 12, is that your verdict?

10 JUROR NO. 12: Yes.

11 THE CLERK: So say you all.

12 (Whereupon, the jurors answered in the affirmative.)

13 THE COURT: Ladies and gentlemen, it has been  
14 almost six days now. I want to thank you for the time,  
15 attention -- and I understand the perspiration in the  
16 jury room that you have given to this case. You have  
17 concluded your service insofar as this case is concerned.  
18 I understand you now must return downstairs to the  
19 central jury part. Is that correct?

20 THE CLERK: Yes, your Honor.

21 THE COURT: You have their cards?

22 THE CLERK: I do.

23 Juror No. 1, I'll give you all 12 cards. When  
24 you leave the courtroom, give them out.

25 THE COURT: Thank you, ladies and gentlemen. You

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